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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CHURCH OF SCIENTOLOGY OF CALIFORNIA, Plaintiff, vs. GERALD ARMSTRONG, DOES 1 THROUGH 10, INCLUSIVE Defendants.	Case No. C 420 153 BRIEF IN OPPOSITION TO MOTION OF BENT CORYDON FOR AN ORDER DIRECTING THE PARTIES TO FILE AN EXECUTED DUPLICATE ORIGINAL OF THE MUTUAL RELEASE AND SETTLEMENT AGREEMENT
MARY SUE HUBBARD, Intervenor.	
GERALD ARMSTRONG, Cross-Complainant, vs. CHURCH OF SCIENTOLOGY OF CALIFORNIA, a California corporation, et al., Cross-Defendants.	Date: February 21, 1989 Time: 9:00 a.m. Dept: 56

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Bent Corydon, a non-party to this action, has filed two separate motions by two separate counsel concerning the records and files in this case. The first is a motion filed through counsel Paul Morantz, to which the plaintiff Church of Scientology of California ("the Church") has responded in a separate memorandum filed today. Corydon's second motion, through counsel Federico Sayre and Toby Plevin, seeks to require the actual parties to this action to file with the court a copy of the Mutual Release and Settlement Agreement between them, and further seeks to have the Agreement filed unsealed. The Church responds to the second motion herein.

Corydon asserts that he is entitled to require the Church to file in the court the Mutual Release Agreement it signed with Armstrong. Despite the terms of a stipulation of the parties and an order of the court requiring the Agreement be sealed, he further asserts, assuming he is entitled to require the Agreement be filed, that the Agreement should be filed unsealed because the Church allegedly has "unclean hands."

Corydon is not entitled to any of the relief he seeks. First, Corydon is a non-party who has no standing to require the Agreement to be filed. Second, the parties to a settlement are not required to file the detailed terms of the settlement, and as the facts below show, there was nothing improper about the fact that the Agreement was not filed in this case. Third, even if the Agreement should now be filed, it should be filed under seal, as provided in the parties' stipulation and the court's

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order. Finally, the terms of the mutual release agreement which Corydon has placed before the court are entirely legal and do not violate any public policy, as he claims.

FACTS

On December 11, 1986, the Church and defendant Armstrong filed with Judge Paul Breckenridge a stipulation stating that on December 6, the parties had entered into a "Mutual Release of All Claims and Settlement Agreement," (Exhibit A to Corydon's moving papers). (All exhibit references herein are to Corydon's Exhibits.) The critical element of the settlement of the case was the agreement for the return to the Church of documents which had been taken from it by Armstrong, see Transcript of Proceedings December 11, 1986, Exhibit B, at 2, which were then held under seal in the court. The return of these documents was the Church's central purpose in filing suit originally. The Joint Stipulation of Dismissal states that the Release Agreement had been filed with the clerk of the court under seal, and was to be "kept under seal." On December 11, 1986, Judge Breckenridge signed an order dismissing the action and ordering that the Agreement "be retained by the Clerk of this Court under seal." Exhibit C.

While the order reflected the Judge's understanding that the Agreement was being "filed herein under seal," the Judge was quickly informed that the Agreement in fact had not been filed. Judge Breckenridge stated that having had conversations that day with the Church's counsel, John G. Peterson, he had learned that the Agreement had not been filed. Exhibit E. In a

December 17, 1986 minute order, Judge Breckenridge stated that the Clerk had had conversations with Armstrong's counsel and with the Church's counsel on two separate occasions. The judge then ordered that:

> Pursuant to oral agreement of both counsel that notwithstanding the fact that the document entitled, "Mutual Release of All Claims and Settlement Agreement", has not been filed, the "Order for Return of Exhibits and Sealed Documents" is to be complied with.

Exhibit F. Thus, despite being fully aware that the Agreement had not been filed, Judge Breckenridge ordered compliance with the key provision of the settlement -- the return from the clerk's office to the Church of the documents. Clearly, if Judge Breckenridge had believed the filing of the Agreement was necessary to effectuate the settlement itself, he would have refrained from ordering compliance with the terms of the settlement. The clear implication of the December 17 order was the following: it was the parties who originally desired the filing of the Agreement but had given their oral agreement that the settlement should go forward without the filing; the judge himself had no objection to the settlement of the case without the filing.

1. Corydon Is Not a Party in This Case and Has No Standing to Require the Agreement to Be Filed or Unsealed

In order to demonstrate it has standing to collaterally attack a sealing order, a non-party must "establish a right, claim, or interest, accruing before the issuance of the order [which] is prejudiced or injuriously affected by its enforcement." Mary R. v. B. & R. Corp. (1983) 149 Cal.App.3d

308, 315, 196 Cal.Rptr. 871, 875. Corydon has no preexisting right which could be injured in this case.

Corydon had no preexisting right to require the parties in this case to file the Agreement which they reached, or to file it unsealed. As shown, supra, it is entirely routine for parties to settle cases by filing stipulations pursuant to outside settlement agreements which are never filed with the court. It is also completely routine for courts to seal the provisions of settlement agreements. The parties were free to keep the Agreement to themselves. Nor did their decision to stipulate to the filing of the Agreement under seal give Corydon any rights. Corydon could not have had any expectation of seeing the Agreement, since the stipulation specified that it was to be filed and maintained under seal.

Mary R involved a collateral attack by the Division of Medical Quality of the Board of Medical Quality Assurance ("Division") on a court order sealing the court records and prohibiting the parties and others from discussing the facts of the case, which the court had dismissed by stipulation. The case involved allegations that a physician had sexually molested a fourteen year old girl, who was his patient. The Division had statutory obligations to supervise and regulate the practice of medicine in the state and to investigate allegations of physician's misconduct. The court held that the Division had standing to challenge the order based on its statutory obligations, since the order interfered with its ability to investigate the physician's misconduct and infringed on the "integrity of [its] investigatory powers." 196 Cal.Rptr. at

875. The considerations permitting standing in Mary R are absent here. Corydon has no right, statutory or otherwise, infringed by the nonfiling of the Agreement or by the sealing of that Agreement.

2. The Fact That the Agreement Was Not Filed Was Completely Proper

Corydon's claims that the Agreement must be filed and that it be unsealed rest to a large degree on his baseless charges that the nonfiling of the agreement was a flagrant contempt of court. As the facts show, the nonfiling was clearly acquiesced in by the court, and reflects no "contempt."

As previously stated, it is entirely normal, when approved by the court, for parties settling a case either to file a stipulation settling a case pursuant to an agreement which is not filed or to file the agreement under seal. See, e.g., Owen v. United States (9th Cir. 1983) 713 F.2d 1461, 1462; Champion v. Superior Court (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, 629. In this case, the parties first determined to file the agreement under seal, and therefore so stipulated. Judge Breckenridge, accepting their decision, entered an order on December 11, 1986, stating that the Agreement, which the court believed had been filed, would be kept under seal.

The very next day, the Court had a conversation with the Church's counsel in which he learned that the Agreement had not been filed. His order that day reflects this fact, but does not order or even suggest that the Agreement should be filed. The order of December 17 reflects that the judge was aware of a

number of conversations between the clerk and counsel for the parties which, at least in part, addressed the fact that the Agreement still had not been filed and that the parties nevertheless wished the settlement to be implemented. This course was obviously acceptable to the judge, since he ordered compliance with the settlement provisions requiring the clerk's office to return the documents and exhibits to the Church "notwithstanding" the fact that the Agreement had not been filed. Furthermore, the judge made clear that his action was prompted by the parties' decision that the filing of the Agreement was unnecessary; the judge took his action "[p]ursuant to oral agreement of both counsel."

Given these facts, Corydon's suggestion that the nonfiling of the Agreement was contempt of court is utterly frivolous. As shown below, since there was not contempt of court, Corydon's argument that the Church has unclean hands requiring the Agreement to be unsealed is also frivolous.

3. Even if the Agreement Should Be Filed, It Should Be Filed Under Seal and Maintained Under Seal

Even assuming that the Agreement should be filed, it should be filed under seal and maintained under seal, and Corydon should not be permitted to inspect it. Settlement agreements are filed and maintained under seal as a matter of course. See, e.g., Champion v. Superior Court (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, 629; Owen v. United States (9th Cir. 1983) 713 F.2d 1461, 1462; EEOC v. Strasburger, Price, Kelton, Martin and Unis (5th Cir. 1980)

626 F.2d 1272, 1274; Seven Gables Corp. v. Sterling Recreation Organization (W.D. Wash. 1988) 686 F.Supp. 1418, 1425.[1]

"The legal principles governing compromise and release agreements are the same as those governing other contracts." Burbank Studios v. Workers' Compensation Appeals Board (1982) 134 Cal.App.3d 929, 935, 184 Cal.Rptr. 879, 882; see also Gorman v. Holte (1984) 164 Cal.App.3d 984, 988, 211 Cal.Rptr. 34, 37. The decision to have a settlement agreement sealed is a bargained-for provision of the settlement contract, which should be upheld according to governing contract principles.[2]

The importance of permitting sealing of settlement agreement was recognized in In re Franklin National Bank Securities Litigation, 92 F.R.D. 468 (E.D.N.Y. 1981), aff'd sub nom., Federal Deposit Insurance Corp. v. Ernst & Ernst (2d Cir. 1982) 677 F.2d 230, 232 where the court denied a motion of a non-party to unseal a settlement agreement. Relying on the strong policy in favor of encouraging settlement of cases, see also Phelps v. Kozakar (1983) 146

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1. The procedure is so routine that at least one court has asked the parties whether they wished their settlement sealed, assuming that they did. See Houston Oil & Mineral Corp. v. SEEC, Inc., No. 82-0922 L (W.D. La. October 25, 1988) (available on LEXIS, genfed library, Dist. file)("THE COURT: I assume you want the terms of your settlement agreement under seal or do you?")

2. See Mack Truck, Inc. v. United Wholesale Distributors, Inc., No. 88-0422 (E.D.N.Y. July 30, 1988) (available on LEXIS, genfed library, Dist. file) ("This Court may not presume that [party's objection to] the [proposed] sealing order was too minor or technical to preclude a binding contract.")

Cal.App.3d 1078, 1082, 194 Cal.Rptr. 872, the court held that the seal must be maintained since, "[w]ithout secrecy of the terms, a settlement would not have been consummated." In re Franklin National Securities Bank Litigation, 92 F.R.D. at 472.

Here too, the sealing of the Agreement was crucial to the settlement. The clear intent of the parties here was that the Agreement, if it was to be filed at all, should be filed under seal. Judge Breckenridge recognized that the sealing was a term in the parties' contract of settlement, had no objections to it, and ordered that the agreement be sealed, pursuant to the contract. All this was routine and proper.

Nothing that Corydon asserts justifies disturbing the parties' expectation in the privacy of their settlement agreement. Before the sealing of a settlement agreement may be disturbed, "extraordinary circumstance" or "compelling need" must be shown. FDIC v. Ernst & Ernst (2d Cir. 1982) 677 F.2d 230, 232. This high standard is appropriate given the strong policy in favor of settling legal disputes and parties' legitimate expectations in reliance on confidentiality of the terms of their settlement agreements. Id. at 231-32; see also In re Franklin, supra.

Corydon makes several arguments in favor of unsealing. One claim is that because the Agreement was not filed, the Church and Armstrong are in contempt of Judge Breckenridge's order and are therefore not entitled to make equitable demands on the court. This "unclean hands" argument carries no weight

whatsoever. As shown above, given the conversations had between the parties, Judge Breckenridge and the clerk and given the orders entered by the Judge, it is a gross distortion to label the nonfiling of the Agreement as "contempt of court." Corydon's other argument for unsealing is that the alleged terms of the settlement are illegal or against public policy. Neither part of this contention is true, as shown infra.

4. The Terms of the Purported Franks Release Agreement Limiting Voluntary Assistance to Opponents of the Church Is Neither Illegal Nor Inconsistent with Public Policy and Provides No Basis for Requiring the Filing or Unsealing of the Release Agreement Between the Parties

Corydon has filed with the court a redacted copy of what he claims is a Mutual Release Agreement between the Church and an individual named Franks. (Exhibit H) Corydon appears to claim, Memo. at 6, that the Church's Release Agreement with Armstrong contains the same terms as the purported Franks Agreement. From this premise and from incorrect conclusions regarding the terms of the Franks Agreement, Corydon argues that the Release Agreement in this case must contain terms that are illegal and violate public policy and concludes that the Agreement must be filed and unsealed. This bootstrapping argument fails because Corydon's contentions that terms of the purported Franks Agreement are illegal or void as against public policy are plainly wrong.

The critical provisions of the purported Franks Release Agreement state that the individual agrees not to testify in any proceeding adverse to Scientology "unless compelled to do so by lawful subpoena or other lawful process." Exhibit H, Provision

6H. It further states that the individual agrees not to discuss "this litigation" "[u]nless required to do so by such subpoena." Id. Finally, the agreement provides that the individual "shall not make himself amenable to service of any such subpoena in a manner which invalidates the intent of this provision." Id.

These provisions are entirely within the bounds of law and of public policy. They merely provide that the individual will not provide voluntary assistance to persons adverse to the Church, but recognize the individual's legal obligation to testify when "compelled to do so by lawful subpoena or other lawful process." These provisions merely establish a contract to do (or not do) what the individual was lawfully entitled to do prior to the contract. There is similarly nothing improper about providing that the individual will not make himself amenable to service of a subpoena "in a manner which invalidates the intent of this provision." This clause merely prevents the possibility of collusion -- where the individual evades the intent of the agreement that he not voluntarily cooperate, by going out of his way to make himself amenable to service. The clause in no way interferes with service in the normal course. The clause, like the other provisions, merely requires the individual to do what he is otherwise free to do -- accept service in the normal course, without making efforts to facilitate service.

The cases Corydon relies on do not support the conclusion that the Franks Release Agreement terms are improper; to the

contrary, their differences from this case demonstrate the propriety of the terms. The most salient point in Mary R. v. B. & R. Corp. (4th Dist. 1983) 149 Cal.App.3d 308, 313, 196 Cal.Rptr. 871, 873, is that the trial court in dismissing the action issued a blanket order to "the parties, their agents or representatives never to discuss the case with anyone." Thus, the court's order prohibited the parties and others, under penalty of contempt, from complying with an administrative or other subpoena which the Division might have issued or even from complying with subpoena to testify in court. In stark contrast, here the Franks Agreement does not interfere with judicial or administrative process. The terms against voluntary cooperation fall far short of an order banning all communications.

The hundred-year-old case of Tappan v. Albany Brewing Co. (1889) 80 Cal. 570, lends no strength to Corydon's argument. That case involved a party's duty of disclosure to the court and to other parties in the case.[3/] Here, of course, Corydon was not a party to this case. He had no rights in the case and the parties had no obligations to him.

Furthermore, in Tappan, the defendant agreed to withhold information in judicial proceeding regarding a fact centrally relevant to the proceeding. In the Agreement presented here,

3. Tappan involved an action for partition of real property, in which a number of people had interests. One of these individuals learned that the property had been sold for much less than its real value. She was about to commence proceedings to prevent confirmation of the sale, but was induced not to by interested parties, who agreed to pay her $1000 if she refrained from making objection to the sale. The court refused to enforce her claim for the portion of the $1000 not paid to her, holding she had concealed a fact from the court and the parties which was material to the parties' rights and which "it was her duty to make known." 80 Cal. at 571-72.

the parties agreed that one party would not voluntarily assist opponents of the Church. Corydon's contention that failure to disclose an agreement providing generally for noncooperation -- outside the context of any particular case -- is equivalent to failure to disclose an agreement to withhold information crucial to the resolution of a pending case is frivolous.

Corydon's reliance on Maryland Casualty Co. v. Fidelity & Casualty Co. of New York (Ct. App. 1925) 71 Cal.App. 492 is also misplaced. In that case, the court stated that in considering the question of what constitutes public policy:

> [M]any courts have cautioned against recklessness in condemning contracts as being against public policy. Thus, it has been said by an English judge that public policy is an unruly horse astride of which one may be carried into unknown paths. . . The power to invalidate agreements on the ground of public policy is so far-reaching and so easily abused that it should be called into action only in cases where the dangerous tendency clearly and unequivocally appears from the contract itself. Courts are reluctant, therefore, to declare a contract void as against public policy, and will refuse to do so if by any reasonable construction it may be upheld.

71 Cal.App. at 497. California courts have been reluctant to void contracts on public policy grounds. "'No court ought to refuse its aid to enforce a contract on doubtful or uncertain grounds.'" Moran v. Harris (4th Dist. 1982) 131 Cal.App.3d 913, 920, 182 Cal.Rptr. 519, 522, quoting Stephens v. Southern Pacific Co. (1895) 109 Cal. 86, 89-90, 41 P. 783. Furthermore, the "burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state . . ." Moran v. Harris, 182 Cal.Rptr. at 522, quoting Stephens. In addition, "[i]n determining whether the subject of a given contract violates public policy, courts must

rely on the state of the law as it existed at the time the contract was made." Moran v. Harris, 182 Cal.Rptr. at 521. Under these principles, it is clear that enforced filing and unsealing is not required. Corydon has not carried his burden of showing that the terms of the Agreement were "clearly and unequivocally" contrary to public policy at the time the contract was made.

Though not acknowledged by Corydon, the court in Maryland Casualty found no public policy violation in the contract there.[4/] As here, the parties to the agreement had no duty to the third person which could be breached by the agreement. 71 Cal.App. at 497-98.[5/]

Finally, Corydon tentatively asserts that the Agreement violates Penal Code § 138.[6/] This is clearly incorrect.

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4. Corydon cites Maryland Casualty only to selectively quote from Eggleston v. Pantages, 103 Wash. 458, 175 P. 34, cited therein. In Eggleston the court held that an agreement not to file an action for the appointment of a receiver after the action had already been "instituted" by certain stockholders obstructed "justice for the purpose of wronging others interested." Thus, Eggleston, like Tappan, involved an agreement not to take action in a case which would have adverse effects on the rights of others having an interest in that case.

5. Corydon's reference to Fong v. Miller (1951) 105 Cal.App.2d 411, 233 P.2d 606, is also misplaced. That case involved an illegal contract to receive profits from alcohol sales and gambling devices.

6. Section 138 provides:

> (a) Every person who gives or offers or promises to give to any witness or person about to be called as a witness, any bribe upon any understanding or agreement that the person shall not attend upon any trial or other judicial proceeding, or every person who attempts by means of any offer of a bribe to dissuade any person from attending upon any trial or other judicial proceeding, is guilty of a felony.
>
> (b) Every person who is a witness, or is about to be called as such, who receives, or offers to receive, any bribe, upon any understanding that his or her testimony shall be influenced thereby, or that he or she will absent himself or herself from the trial or proceeding upon which his or her testimony is required, is guilty of a felony.

The Agreement does not provide that anyone "shall not attend a trial or other judicial proceeding." To the contrary it acknowledges the duty to respond to lawful process. Furthermore, § 138 requires that a party to the agreement be a "witness or [a] person about to be called as a witness." There is nothing to suggest that any party to the Agreement was either a witness or about to be called.

CONCLUSION

For the foregoing reasons, Corydon's motion to require the filing and unsealing of the Mutual Release Agreement between the parties should be denied.

Dated: February 13, 1989

Respectfully submitted,

RABINOWITZ, BOUDIN, STANDARD KRINSKY & LIEBERMAN, P.C.

By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 6255 Sunset Blvd., Suite 2000, Hollywood, California 90028.

On February 13, 1989, I caused to be served the foregoing document described as BRIEF IN OPPOSITION TO MOTION OF BENT CORYDON FOR AN ORDER DIRECTING THE PARTIES TO FILE AN EXECUTED DUPLICATE ORIGINAL OF THE MUTUAL RELEASE AND SETTLEMENT AGREEMENT on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Hollywood, California, addressed as follows:

SEE ATTACHED LIST.

If hand service is indicated on the attached list, I caused this to be served by hand, otherwise I caused such envelopes with postage thereon fully prepaid to be placed in the United States mail at Hollywood, California.

Executed on February 13, 1989 at Hollywood, California.

SERVICE LIST

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